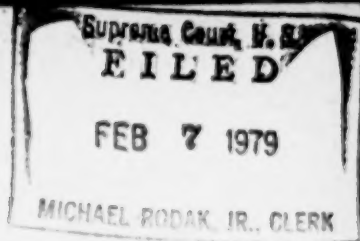


No. 78-943



In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN Q. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of his dismissal from the Defense Contract Audit Agency (DCAA). He argues that the courts below did not apply the appropriate standard of review, that the penalty of dismissal was too harsh, and that the Civil Service Commission improperly considered extra-record evidence in making its decision.

1. Petitioner was a GS-12 auditor with the Defense Contract Audit Agency. After several warning letters he was notified on October 6, 1972, that DCAA intended to discharge him for failure to perform his duties in accordance with agency requirements (Pet. App. 11a). The letter notifying petitioner of his discharge discussed four general areas of deficiency and more than 20 specific assignments that petitioner had failed to complete satisfactorily (Pet. App. 32a-44a). Petitioner appealed the final discharge decision to the Dallas Regional Office of the Civil Service

Commission, which recommended that he be reinstated (Pet. App. 31a-65a). DCAA then appealed the Regional Office's decision to the Civil Service Commission's Board of Appeals and Review. The Board considered written submissions from both parties and upheld petitioner's discharge (Pet. App. 13a-30a).

Petitioner brought this suit for review of the final decision of the Civil Service Commission, arguing that the DCAA's decision to discharge him was arbitrary, capricious, and not supported by the evidence. After reviewing the administrative record, the district court granted summary judgment for the government, finding that petitioner had been granted all procedural rights to which he was entitled, and that the agency's decision was neither arbitrary nor capricious (Pet. App. 10a-12a). The court of appeals affirmed (Pet. App. 1a-9a).

2. There is no support for petitioner's contention (Pet. 8-17) that the court of appeals failed to review his dismissal to determine whether the agency's action was arbitrary and capricious. Quoting *Gueory v. Hampton*, 510 F. 2d 1222 (D.C. Cir. 1974), the court held (Pet. App. 6a-7a; footnotes omitted): "[w]e may determine only 'whether the decision to remove the employee was arbitrary and capricious,' * * *. These precepts compel affirmance in the instant case." Since both the court of appeals and the district court held that the agency did not abuse its discretion, there is no reason for this Court to review petitioner's claim (Pet. 17-26) that dismissal was too severe a penalty. See *Berenyi v. Immigration Director*, 385 U.S. 630 (1967).

Petitioner's contention (Pet. 26-29) that the agency's reliance on extra-record evidence deprived him of the opportunity to respond to the charges against him is insubstantial. As the court of appeals pointed out (Pet. App. 5a-6a & n.13), even assuming that the submission to which petitioner refers properly may be characterized as evidence rather than as a reply brief for the agency, any

procedural error was harmless since the administrative decision shows this evidence "played no apparent role in the Board's determination with respect to the six specifications it sustained."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979